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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 146

ELIE P. AGHNIDES,

Petitioner,

against

MARGOT E. AGHNIDES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT.

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INDEX.

	PAGE
Citations to Opinions Below	1
Jurisdiction	2
Constitution and Statutes Involved	2
Questions	3
Statement of Facts	6
Argument	12
Conclusion	22
Appendix A—Constitution and Statutes	24
B—Opinions, Judgments, etc. in the instant Injunction action	26
C—Opinions in the prior, related Separation action	50

TABLE OF CASES.

	PAGE
Adam v. Saenger, 303 U. S. 59 (1938)	20
Aetna Life Ins. Co. v. Dunken, 266 U. S. 389 (1924)	5, 19
Atchison, T. & S. F. Ry. Co. v. Sowers, 213 U. S. 55 (1909)	15
Barber v. Barber, 323 U. S. 77 (1944)	20, 21
Bracksmayer v. Bracksmayer, 22 N. Y. Supp. 2d 110, Sup. Ct. N. Y. Co. (1940)	21
Broderick v. Rosner, 294 U. S. 629 (1935)	15
Coe v. Coe, 334 U. S. 378 (1948)	3, 13
Cole v. Cunningham, 133 U. S. 107 (1890)	3, 11, 12, 13, 14, 15
Connecticut Ins. Co. v. Moore, 333 U. S. 541 (1948)	20
Estin v. Estin, 334 U. S. 541 (1948)	3
First Natl. Bank of Chicago, Exec. v. United Air Lines, Inc., 342 U. S. 396 (1952)	15
Fordice v. Fordice, 126 Ind. App. 562, 132 N. E. 2d 618 (1956)	20
Garvin v. Garvin, 302 N. Y. 96 (1951)	11
Harrington v. Harrington, 290 N. Y. 126 (1943)	17
Hartford Accident & Indemnity Co. et al. v. Delta & Pine Land Co., 292 U. S. 143 (1934)	5, 19
Home Ins. Co. v. Dick, (1930) 281 U. S. 397	19
Home Ins. Co. v. Morse, (1874) 20 Wall. (U. S.) 445	15
Hughes v. Fetter, 341 U. S. 609 (1951)	15
Magnolia Petroleum Co. v. Hunt, 320 U. S. 430 (1943)	16, 22
Mitchell v. Mitchell, 126 Ind. App. 377 (1956)	20
Norris v. Alabama, 294 U. S. 587 (1935)	12
Order of Travelers v. Wolfe, 331 U. S. 586 (1947)	5, 19
Postal Telegraph Cable Co. v. City of Newport, Kentucky, 247 U. S. 464 (1918)	4, 11, 15

PAGE

Sherrer v. *Sherrer*, 334 U. S. 343 (1948) 3, 13

Tennessee Coal & Iron & R. Co. v. *George*, 233 U. S. 354 (1914) 15

Vanderbilt v. *Vanderbilt*, 354 U. S. 416 (1957) 3, 13

Williams v. *North Carolina*, 317 U. S. 287 (1942) 3, 11, 13, 14

STATUTES.

Burns Indiana Stat. Tit. 44 Sec. 44-106 (App. A, p. 25) 20

Burns Indiana Stat. Tit. 3, Sec. 3-1201 (App. A, p. 25) fn. 14

Constitution of Indiana, Art. I, Sec. 12 (App. A, p. 25) 14, 15

N. Y. Constitution Art. 6, Sec. 7 17

N. Y. Civil Prac. Act Sec. 605 17

N. Y. C. P. A. Sec. 1139 ..... 6, 20

OTHER AUTHORITIES.

2 Law & Contemp. Prob. 370, 380 14

14 Corp. Jur. Sec., p. 1311 21

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the Judgment of Affirmance entered in the Supreme Court of the State of New York, County of New York, on October, 31, 1957, on the Order of Affirmance by the Appellate Division of the Supreme Court, First Judicial Department, dated and entered October 29, 1957.

Citations to Opinions Below.

In the instant, *Injunction* action:

The Opinion of the Appellate Division on affirmance of the judgment of the trial court, printed in Appendix B, p. 26, is reported in 4 App. Div. 2d 498.

The Opinion of the Supreme Court upon completion of the trial, printed in Appendix B, p. 29, is reported in 159 N. Y. Supp. 2d 343.

The Opinion of the Supreme Court on granting an injunction *pendente lite*, printed in Appendix B, p. 38, is reported in 150 N. Y. Supp. 2d 371.

In the prior, *Separation* action between the same parties:

The Opinion of the Court of Appeals, printed in Appendix C, p. 50, is reported in 308 N. Y. 530.

The Opinion of the Appellate Division, printed in Appendix C, p. 51, is reported in 283 App. Div. 1054.

The Opinion of the Supreme Court, upon completion of the trial, printed in Appendix C, p. 52, is not reported.

Jurisdiction.

The Judgment sought to be reviewed was entered in the Supreme Court of the State of New York for the County of New York on October 31, 1957 (App. B, p. 42), in conformity with an Order of Affirmance by the Appellate Division of said Court dated and entered October 29, 1957 (App. B, p. 43). These constitute the final judgment of the highest available court in New York because Petitioner's successive motions for leave to appeal therefrom to the Court of Appeals were denied by the Appellate Division by Order dated January 28, 1958 (App. B, p. 46; 170 N. Y. Supp. 2d 977) and by the Court of Appeals by Order dated April 3, 1958 (App. B, p. 47; N. Y. Supp. 2d). Certified copies of these orders are attached to and constitute part of the Certified Record. The time for filing this Petition is computed from the latter Order, April 3, 1958, and expires July 2, 1958.

The jurisdiction of this Court is invoked under 28 U. S. Code, Section 1257(3).

Constitution and Statutes Involved.

Article IV; Sections 1 and 2(1) and Amendment XIV, Section 1, of the Constitution of the United States; Title

28, Section 1738 (in part) United States Code; Section 1139 (in part) New York Civil Practice Act; Constitution of Indiana, Article I, Section 12; Title 3, Section 3-1204 (in part), and Title 44, Section 44-102 (in part) Burns Indiana Statutes, are involved and are printed in App. A, p. 23).

Questions.

(1) Does not the ruling of this Court in *Cole* v. *Cunningham*[1] establish that an injunction against prosecution of an action in a sister State may be issued, consonantly with the Full Faith and Credit Clause and the Privileges and Immunities Clause of the United States Constitution only in a "proper case", and that a "proper case" requires

(a) that both plaintiff and defendant in the injunction suit both be citizens and residents of the enjoining State at the commencement of the action in the sister State? *and*

(b) that—in the light of the later decisions of this Court in the *Williams*,[2] *Estin*,[3] *Sherrer*,[4] *Coe*[5] and *Vanderbilt*[6] cases establishing the right of a husband to sue for divorce in any sister State despite a judgment for separate maintenance lodged against him in his home State—the action enjoined not be an action for divorce?

(2) If New York issues an injunction against the prosecution by a husband, a New York citizen, of his action in Indiana, based on fraud, against his wife, a resident of Indiana, for annulment of their marriage which took place in Indiana, and New York expressly bases its injunction

[1] 133 U. S. 107 (1890).
[2] *Williams* v. *North Carolina*, 317 U. S. 287 (1942).
[3] *Estin* v. *Estin*, 334 U. S. 541 (1948).
[4] *Sherrer* v. *Sherrer*, 334 U. S. 343 (1948).
[5] *Coe* v. *Coe*, 334 U. S. 378 (1948).
[6] *Vanderbilt* v. *Vanderbilt*, 354 U. S. 416 (1957).

upon the ground that a prior New York judgment is *res judicata*, adversely to the husband, of the issue of fraud in the Indiana action, whereas in fact an examination of the prior New York record shows conclusively that not only is it not *res judicata* of the absence of fraud on the part of the wife but exactly the reverse, is not the constitutional right of the husband to bring suit in any state in this union denied to him, and is it not the duty of this Court, as it precisely ruled on the basis of the due process clause of the Fourteenth Amendment, in *Postal Telegraph Cable Co. v. City of Newport, Kentucky*[1] to determine for itself, from the record below, whether the prior judgment is *res judicata* or not, and finding it is not, to vacate the injunction?

(3) When Petitioner, a resident of New York, and Respondent, a resident of Indiana, were married in Indiana, spent five days in a New York Hotel prior to a six-week honeymoon in Europe and, immediately upon return from Europe, four days in a New York hotel during which it is conceded there was no sexual contact between them but estrangement followed by her return to Indiana at the end of the said four days, and New York permanently enjoins Petitioner from prosecuting his first-commenced action in Indiana for annulment for fraud, expressly resting the injunction upon the dismissal, in Respondent's New York later action for separation, of Petitioner's counterclaim for annulment for fraud, the ruling on that counterclaim having been that Respondent was guilty of fraud in entering the marriage but that N. Y. Civil Practice Act Section 1139 bars annulment because Petitioner cohabited with Respondent as man and wife after learning of the fraud during the honeymoon in Europe, is not the injunction issued by the Court below

(a) A denial of due process of law to the Petitioner because the decisions of this Court in *Aetna Life Ins. Co.*

[1] 247 U. S. 464 (1918).

v. *Dunken*,[8] *Hartford Accident & Indemnity Co., et al.* v. *Delta & Pine Land Co.*,[9] *Order of Travelers* v. *Wolfe*,[10] and related cases, require the application of Indiana, not New York law to the question of annulment, in that the marriage and the fraud took place not in New York but in Indiana; the sexual intercourse, if any, that may have taken place after disclosure of the fraud, took place not in New York but in Europe or on the high seas; the action in which the said adjudication was made was initiated by Respondent not as a domiciliary of New York but solely on the basis of personal service upon Petitioner as a New York resident; the record in the New York action proves conclusively that there is no bar for condonation contained in the Indiana statute authorizing annulment and that condonation under Indiana law is entirely a matter of intent and in Indiana an act of sexual intercourse does not, in itself prove intent; and that New York has no contact with the substance of the marital relations between the parties but was merely the forum?

(b) A denial of full faith and credit to the Indiana Statute authorizing annulment upon which the enjoined Indiana action is based and which unlike New York Civil Practice Act Section 1139, contains no bar for cohabitation after disclosure of the fraud?

(c) A denial of full faith and credit to the prior and pending Indiana action for annulment in which an interlocutory adjudication had been made, after a trial of the issue, that Indiana had jurisdiction of the suit for annulment?

(d) A denial of due process to the Petitioner in that the said injunction was based, in part, upon findings that Respondent was a resident of New York from the date of

[8] 266 U. S. 389 (1924).
[9] 292 U. S. 143 (1934).
[10] 331 U. S. 586 (1947).

her marriage to Petitioner and that the marital *res* was in New York both of which findings are in conflict not only with the prior Indiana ruling that Indiana had jurisdiction but in opposition to the prior New York adjudication itself upon which the Injunction relied since in that prior action New York's jurisdiction was procedurally invoked only, and nowhere in that action was it judicially found or even suggested that New York was either the domicile of the Respondent or the marital *res*.

(4) Is not a New York injunction against prosecution of an action in Indiana by a husband for divorce based on cruelty a denial of due process of law to the husband where New York bases its injunction solely upon the ground of a prior New York judgment dismissing the husband's action for separation for cruelty, where the record in the injunction action shows the Indiana law of cruelty to be different from New York law? Is not the injunction at the same time a denial of full faith and credit to the Indiana laws and the statute upon which the action for divorce in Indiana is based?

(5) Assuming, *arguendo*, that the proper conflict of laws rule would justify the application of N. Y. C. P. A. Sec. 1139, barring annulment for condonation, does not the construction of the said statute accepted by the court below, namely, that a natural, uninhibited act of intercourse by a husband, without contraceptives, condones the intention of the wife not to have children, render the statute unconstitutional as a contradiction in terms, and as applied to the Petitioner herein, constitute a denial of due process of law?

Statement of Facts.

The judgment to be reviewed affirmed the Trial Court's judgment (App. B, p. 44) enjoining Petitioner permanently from further prosecuting the action for divorce and

annulment theretofore instituted in Indiana by Petitioner against Respondent. The Trial Court which granted the injunction based its decision in Respondent's favor upon its findings, (R., fols. 501-4) that a previous judgment of separation granted by the New York Supreme Court to Respondent against Petitioner, in a previous action was *res judicata* of the issues in the said Indiana action; that *Petitioner*, in continuing to prosecute the Indiana action, was seeking to evade the laws of New York; that the New York judgment of separation is entitled to full faith and credit in Indiana; that judgment in Petitioner's favor in Indiana would impair rights of the Respondent under the New York separation judgment; that Respondent had no adequate remedy at law; that a ruling in the Indiana action that Respondent was at all times resident there was not *res judicata* or entitled to full faith and credit; that Respondent had been a resident of New York since her marriage to Petitioner (R. fol. 491); and that "the marital *res* of the parties to this action is in the State of New York."

The trial, findings, decision and opinions resulting in the judgment sought to be reviewed constantly involve the record of the prior separation action, so that Petitioner has filed in this Court certified transcripts of the records in both actions.

Petitioner, the husband, a recognized scientist and inventor, a member of a distinguished Greek Orthodox family, and a resident of New York, and the Respondent, the wife, a resident of Indiana, were married in Indiana on July 19, 1952 (R. fol. 489). With the exception of five days in the Pierre Hotel, New York City, and one day at the Dorset Hotel, New York City, before sailing for Europe on their honeymoon and three days in the Dorset Hotel, New York City upon their return from Europe, at which time she left him and returned to Indiana (R. fols. 536, 7, 8; 490) the couple never lived together as man and wife in New York,

not did they have sexual relations in New York at any time after the date determined in the prior New York action by all the Courts of New York (See opinion of Trial Court in that action and the opinions of affirmance thereof. App. C pp. 50, 51, 52), to be the time when Petitioner should have been aware of Respondent's fraud.

On December 20, 1952, Petitioner instituted action for Divorce in Marion County, Indiana, on the ground of cruel treatment, amending it shortly after by addition of a count for annulment on the ground of fraud (R. fols. 492-3).

On December 22, 1952, two days after Petitioner instituted the action in Indiana, Respondent began an action in New York for separation upon the ground of abandonment (R. fol. 492).

In Indiana, the Respondent moved to abate the Petitioner's action upon the ground that she had not, as required by Indiana law, been a resident of Indiana for one year prior to the commencement of that action, having become, she contended, a resident of New York by virtue of her marriage to Petitioner and that the Indiana court, for that reason, had no jurisdiction of Petitioner's action there (R. fols. 360-65). A trial of this issue was had in Indiana and her contention that her residence was not in Indiana was overruled (R. fol. 179). Respondent then appeared generally in the Indiana action and filed her answer (R. fols. 211-456).

In New York the Petitioner pleaded defenses of cruelty, abandonment and fraud which he, by amendment, was permitted to designate counterclaims for separation on the ground of cruelty and abandonment, and for annulment based on fraud (R. fol. 495).

In the New York action the Trial Court found that the Respondent had abandoned Petitioner (R. fol. 709); that the Respondent represented to Petitioner that she would bear children as required by the tenets of the

Catholic Church, of which she was a member (R. fol. 699); that Respondent, in fact, did not intend to bear children as proved by her visit to a physician in Belgium for the purpose of avoiding conception (R. fols. 700-703); that her attitude on the subject of bearing children had not changed when she offered to return to Petitioner and that that fact decided the issue of separation against her (R. fol. 703); that as to the fraud of Respondent in the inception, it would entitle Petitioner to annulment except for section 1139 of the New York Civil Practice Act which makes cohabitation with knowledge of the fraud a bar to annulment (R. fol. 704); that Petitioner should have known of Respondent's intent late in August, 1952 when she made the outright attempt in Belgium to prevent conception (R. fols. 704-5); that he had intercourse with her after that date and thus waived the fraud (R. fols. 704-5); and dismissed Respondent's complaint and Petitioner's counterclaim for annulment, and ordered judgment for Petitioner on his counterclaim for separation upon the ground that he had been abandoned by Respondent (R. fols. 708, 9, 10).

On cross-appeals, the judgment of the Trial Court, in so far as it granted separation to Petitioner, was struck down by the Appellate Division of the Supreme Court upon the ground that the evidence of bad faith on the part of Respondent in offering to return was not sufficient, and "otherwise affirmed" (App. C, p. 52).

On cross-appeals to the Court of Appeals the latter Court held, five to two, that the Respondent's offers to return were sufficient, and granted her a separation, the dismissal of the Petitioner's counterclaim being affirmed (App. C, p. 51).

Meanwhile, the Indiana action of Petitioner for divorce or annulment had not come to trial because of delay involved in deciding Respondent's many technical motions (R. fols. 630-37) such as the plea in abatement, demurrers,

and two changes of venue granted upon the grounds that people in her community were prejudiced and that a Judge was prejudiced.

Respondent then sued in Supreme Court, New York County to enjoin Petitioner, both *pendente lite* and permanently, from proceeding with the Indiana action (R. fols. 13-30). Injunction *pendente lite* was granted with opinion (App. B, p. 38).

After a trial of the issues (R. fols. 514-672), the Trial Court directed the entry of judgment permanently enjoining Petitioner (App. B, p. 37) and, in connection therewith made, among others, the conclusions and findings referred to above.

In short the Trial Court based its injunction upon the ground that the fraud by Respondent in entering into the marriage, which is the basis of the Indiana annulment action, had already been adjudicated by New York in the previous action as non-existent; that even if there had been fraud, an Indiana annulment would evade section 1139 N. Y. C. P. A. barring annulment for condonation, and that New York has such interest in its domiciliary, the Respondent, and the marital *res* located in New York, that it will protect Respondent from harassment by suit elsewhere; that, as to the Indiana action for divorce on the ground of cruelty, that too has been adjudicated by the judgment of New York dismissing the Petitioner's counterclaim for separation based on cruelty and that a refusal by Indiania to hold the same would be a denial of full faith and credit to the New York judgment.

On appeal, the Appellate Division affirmed (App. B, p. 26), the judgment of injunction solely upon the narrow ground that since it had been previously adjudicated in New York that there was no fraud on the part of Respondent in entering the marriage, it follows that Respondent's residence did not remain in Indiana and that that State

was, therefore lacking in jurisdiction—a ruling in direct opposition to the ruling in Indiana. The Appellate Division concluded that this the act on there becomes the familiar attempt to invoke an out-of-state court having no power and should be enjoined citing as authority *Garvin v. Garvin*[11] which held that the *prima facie* presumption of jurisdiction in a foreign divorce, as decided in the *Williams* case, *supra*, by this court, entitles a domiciliary of the enjoining state who has a prior judgment of separation there, to injunction against the out-of-state action—a very surprising interpretation of the *Williams* decision.

This Court has held in *Cole v. Cunningham*, *supra*, that the Full Faith and Credit Clause and the Privileges and Immunities Clause of Article IV of the United States Constitution as well as the Due Process Clause of the Fourteenth Amendment thereto are implicit in any injunction against the prosecution of an action in a sister-state and that the question to be determined in each case is whether the particular injunction granted brings those provisions into play. This Court further held in *Postal Telegraph Cable Co. v. City of Newport, Kentucky*, *supra*, that when such a Federal question is decided, as it was below, by the principles of *res judicata*, this Court has the duty of examining the prior record and determining for itself whether the question of *res judicata* was soundly determined; and that an unsound application of *res judicata* constitutes a denial of due process.

These questions were raised by Petitioner's answer below in which he in paragraph 9 thereof (App. B, p. 48) denied that the prior New York adjudication was final and conclusive of the Indiana action, and in paragraph 19 thereof (App. B, p. 48) pleaded Article IV of the United States Constitution as well as the Fourteenth Amendment

[11] 302 N. Y. 96 (1951).

thereof as a defense to the demand for the injunction. Article IV of the U. S. Constitution, and the Fourteenth Amendment thereof, as well as the inapplicability of *res judicata* were pressed by Petitioner upon both Trial and Appellate Courts below in briefs and oral argument in those Courts, also.

The Trial Court passed upon the Constitutional questions so presented in its Findings of Fact "10" and "19" (App. B, pp. 48-9) and in its Conclusions of Law "Second", "Fourth" and "Seventh", (App. B, p. 49); and throughout its opinion (App. B, pp. 29-37). The Court below based its affirmance solely upon the *res judicata* effect of the prior New York record, which, under the rulings of this Court in *Cole* and *City of Newport* cases, *supra*, is a due process question, and it considered that question in its opinion (App. B, p. 27).

Argument.

State Courts cannot avoid review by this Court of their disposition of a constitutional claim by casting it in the form of an unreviewable finding of fact. See *Norris v. Alabama*[12]. That doctrine can be paraphrased: A State Court cannot avoid review by this Court of their disposition of a constitutional claim by hiding behind what is often called the traditional power of a State Court to enjoin one of its citizens from proceeding in a foreign state.

New York is attempting that. First, she says that a prior action by New York adjudicated that the fraud, upon which the action for annulment in Indiana depends, was absent from the marriage. Then, she decrees, since *res judicata* is a traditional basis for enjoining the foreign action, it is therefore enjoined. Can it be contended here that this Court cannot look behind the injunction to find that the prior New York action did not adjudicate the absence of fraud but exactly the opposite? Many rulings

[12] 294 U. S. 587, 590 (1934).

of this Court establish not only that this Court may, but that it is its duty to do so.

Further, it is not entirely established that the traditional power of a State Court to enjoin a citizen from prosecuting a foreign action is, in itself, consonant with the U. S. Constitution, at least in matrimonial cases. *Cole* v. *Cunningham*, *supra*, in which this Court declared that the exercise of such equity power is not necessarily in contravention of the United States Constitution, itself makes clear that the power is not unlimited, and that the occasion for its exercise must be a "proper case"; and there this Court held that a creditor bringing action in a foreign state to gain a preference and escape the insolvency proceedings in the home state, where both creditor and debtor were domiciled, made a "proper case". But it seems this Court has not clearly defined the power of a State Court in matrimonial cases. The action in Indiana whose prosecution has been enjoined is a suit for divorce or annulment. And much more recently than *Cole* v. *Cunningham*, this Court has spoken in the first *Williams* case and the *Davis*, *Sherrer*, *Coe* and *Vanderbilt* cases, *supra*, by which it has been established that one state may adjudicate the issue of divorce, despite the admitted jurisdiction of another state to adjudicate the issue of separate maintenance. Are not, therefore, injunctions against the prosecution in a foreign state of divorce suits by a state which has adjudicated the issue of separate maintenance now out of date? Has New York the right not only to compel Petitioner to pay alimony to Respondent for the rest of his life, but in addition to deny him his freedom to remarry if he should wish? All this, because Respondent was kind enough to stay with Petitioner for the honeymoon trip to Europe before deserting him? The right of a spouse to go to any state in this union and seek a divorce if permitted by the laws thereof was declared in the *Williams et seq.* cases to be a constitutional right. This injunction is

a denial of such constitutional right of the Petitioner. The reaffirmance of that right by this Court in the *Williams et seq.* cases was most appropriate in the very light of *Cole* v. *Cunningham*, despite the lack of an injunction issue before this Court in those cases. The three dissenting Justices in *Cole* v. *Cunningham* thought that the issuance of any injunction against the prosecution of a suit in a foreign state was a denial of full faith and credit to the foreign proceedings, as well as an invasion of the privileges and immunities of the enjoined party, in violation of Sections 1 and 2 of Article IV of the United States Constitution. Even the majority opinion, subscribed to by only five Justices, one Justice not participating, expressed the belief that the privileges and immunities clause of the Constitution guaranteed a citizen of every state the right to sue in any state[13]. The majority felt, however, that the facts of the case before them did not show the kind of situation in which the Constitution should be invoked. It may be considered by this Court that the doctrine of that case should be restricted to the type of situation there involved. Moreover, in that case both parties to the injunction suit were citizens and residents of the restraining state when the foreign action was commenced. The Respondent herein was a resident of Indiana when the action was commenced. She moved to New York later. As Professor Jacobs, a recognized authority on the subject of divorce, stated in "The Utility of Injunctions and Declaratory Judgments in Migratory Divorce"[14]: "If the equity petitioner is not a resident of the state, no injunction should issue to restrain the divorce proceedings." And, in the footnote, he states "In all the reported cases we found

[13] *Id.* pp. 113-14. And note that Art. I Sec. 12 of the Indiana Constitution guarantees open Courts to all—a guarantee which is carried over to the citizens of every other State by Art. IV Sec. 2 of the United States Constitution.

[14] 2 Law & Contemp. Prob. 370, 380.

the equity plaintiff to be a resident of the enjoining state." If Indiana had denied Petitioner the right to bring his suit there, this Court would have applied its frequently declared policy that the Courts of each State are required by the U. S. Constitution to be kept open to all citizens of the United States[15]. Art. I, sec. 12 of the Indiana Constitution guarantees open Courts to "every man" and Petitioner, a citizen of New York is, by Art. IV, sec. 2 of the U. S. Constitution, included in the guarantee of the Indiana Constitution. The denial by Petitioner's home state must then be a denial of due process. This Court, in *Cole* v. *Cunningham*, *supra*, referred to the balance between the two, when it indicated that if Massachusetts could enjoin, New York could have refused to entertain[16].

This Court stated in *Postal Telegraph Cable Co.* v. *City of Newport, Kentucky*, *supra*, that *res judicata* is ordinarily a question of local law, but when a Federal right is involved, it is the duty of this Court to examine into the determination of *res judicata* to see whether the principles thereof have been properly applied, for, as this Court said there, an unsound application of *res judicata*, altering the result, constitutes a denial of due process. And, of course, this Court has always been the final arbiter, with

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[15] As this Court said, in *Home Ins. Co.* v. *Morse* (1874), 20 Wall. (U. S.) 445: "Every citizen is entitled to resort to all the courts of the country and to invoke the protection which all the laws or all those courts may afford him." In various other connections, this Court, without referring to the privileges and immunities clause of the United States Constitution, has stricken down attempts, incorporated in statutes, to bar suits by their own citizens in sister states and foreign citizens in their own states, always affirming the basic rule that courts must be kept open to all. See *Hughes* v. *Fetter*, 341 U. S. 609 (1950); *First Nat. Bank of Chicago, Exec.* v. *United Air Lines, Inc.*, 342 U. S. 396 (1951); *Roderick* v. *Rosner*, 294 U. S. 629 (1935); *Atchison, T. & S. F. Ry. Co.* v. *Sowers*, 213 U. S. 55 (1909); *Tennessee Coal & Iron & R. Co.* v. *George*, 233 U. S. 354 (1914).

[16] Opin., p. 144.

respect to the doctrine of *res judicata,* in full faith and credit cases. (See *Magnolia Petroleum Co.* v. *Hunt*)[17]

The court below held that since Petitioner was suing in Indiana for an annulment on the ground of fraud, an injunction against the prosecution of that suit was proper because the New York courts had held in the prior separation suit that the Respondent was not guilty of fraud in entering into marriage in Indiana, the issue in the Indiana suit thereby becoming *res judicata.* It is difficult to believe, but shockingly true, that the New York courts in the prior separation suit had not held that the Respondent did not commit fraud but held exactly the opposite, that the Respondent was guilty of fraud when she contracted her marriage in Indiana. An examination of the record in the prior separation action, a certified copy of which has been filed herein, will show unambiguously and categorically that the finding of both Trial and Appellate Courts in that case was that the Respondent had been guilty of fraud. How then could the Trial and Appellate Courts below make such a gross error as to misunderstand the finding in the prior suit, and then predicate an interstate injunction upon their misconception? An inaccurate version of the lower courts' finding appearing at the tail end of the Opinion of the Court of Appeals in that case was seized upon by the Attorney for the Respondent, upon the trial of the injunction action below and presented to the Trial Court (R. fol. 644) as a finding of the Court of Appeals that there was no fraud on the part of Respondent. The Trial Court itself in its opinion (App. B, p. 36) accepted the version of Respondent's counsel and quoted there the said language of the Court of Appeals, as did the Appellate Division of the Supreme Court in its opinion (App. B, p. 27) on the appeal by Petitioner from the

[17] 320 U. S. 430 (1943).

judgment granting the injunction, the latter being the opinion of the court below whose Order and the Judgment thereon are sought by this Petition to be reviewed. Of course, counsel for Respondent, and the Trial Judge below, should have known that the Court of Appeals of New York is without authority to make an original finding of fact. The Court of Appeals of New York is a court of law, as the New York Civil Practice Act explicitly provides. As the Court of Appeals itself stated in *Harrington* v. *Harrington*:[18] "We have, as we have said, the right to review the new finding and to reverse it, if in our opinion it is not supported by the weight of evidence. We have no power in any other respect to pass upon questions of fact. Ordinarily, where the Appellate Division reverses a finding of fact and then makes a contrary finding, a reversal by this Court of the new finding of fact of the Appellate Division logically requires the reinstatement of the contrary finding of fact by Special Term." The Court then explains that in a case where the finding of Special Term involves discretion it may be advisable to send the case back to Special Term for a new trial. But the Court makes clear that in no case does it, the Court of Appeals, make an original finding, and cites the N. Y. Constitution Art. 6, Sec. 7, and the N. Y. Civil Prac. Act Sec. 605 as the source of the rule. The language of the Court of Appeals in the prior case so quoted by the Trial Court below, properly read, shows itself to be not a finding but a mistaken version of the finding by the Appellate Division. Indeed, in the opinion of the court below, quoting the same language (App. B, p. 27), it is not characterized as a finding of the Court of Appeals. There appears this statement in reference to the quotation:

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[18] 290 N. Y. 126 (1943), at p. 131.

> "Significant for our purposes is the following language of Judge Fuld in writing for the majority of the Court of Appeals in affirming the finding that there was no fraud to support the counterclaim for annulment."

Thus, we see the court below correcting the Trial Court's mistaken notion that the Court of Appeals made a finding. The Appellate Division corrects one mistaken characterization but falls into another, for in fact not only did the Court of Appeals fail to find that there was no fraud but the Appellate Division in the prior case affirmed the finding of the Trial Court in that litigation that there was, indeed, fraud on the part of Respondent in contracting marriage with Petitioner (App. C, p. 52). So, we see that the first prop for the granting of the injunction comes to nothing. The decision of the Appellate Division below whose Order and the Judgment thereon are here sought to be reviewed based its affirmance of the Trial Court's injunction solely upon the false conception that the prior matrimonial action had adjudicated the issue of fraud against the Petitioner, and that, therefore, the issue of the Indiana annulment action was *res judicata*. In its opinion below, the Appellate Division declared (App. B, p. 27): "In view of the finding by the Court of Appeals that proof of fraud by the wife is absent, we affirm, without canvassing the various issues raised by counsel or by the court below. For that finding, which is conclusive here and elsewhere (citing cases), establishes the absence of Indiana jurisdiction." Since the Appellate Division below is flatly in error on this point, it would seem that its Judgment of Affirmance must fall. But since we are then left with other bases predicated by the Trial Court below for its Judgment, let us turn to them.

The Trial Court predicated the injunction upon the further ground that in the prior New York action it had been held that even if Respondent had been guilty of fraud, Petitioner had condoned the same under Section 1139 of the New York Civil Practice Act, and that (App. B, p. 36) his prosecution of the action for annulment in Indiana would be an evasion of this statutory law of New York, in as much as there is no similar statute in Indiana, and the evidence in the case showed what the law of Indiana is on condonation (R., fols. 642, 643) viz. that condonation in Indiana is purely a question of intent and not concluded by evidence of sexual intercourse with knowledge of the fraud.

Since the Respondent had been adjudicated guilty of fraud in contracting marriage with the Petitioner, it follows—as Indiana had already ruled in the litigation in Indiana—that Respondent's residence never left Indiana. Where the Respondent's residence remained in Indiana and the marriage was performed there, how can New York, once having found fraud in the inception, apply New York law to bar an annulment and then issue an injunction to prevent Indiana from applying its own law? This Court has established the principle that when a forum applies its own law to a contract and ignores the conflict of laws rule accepted by this Court which calls for the application of the law of the state where the contract was entered into, the contrary result reached constitutes a denial of due process of law to the complaining party.[19] It may be that the interest of a domiciliary state may some times mitigate the application of the law of the place of contract when the contract is marriage, but in the prior matrimonial action in New York, the New York courts nowhere found Respond-

[19] *Hartford* v. *Delta & Pine Land; Aetna Life* v. *Dunken;* and *Order of Travelers* v. *Wolfe*, cases, *supra*. See also *Home Ins. Co.* v. *Dick*, (1930) 281 U. S. 397.

ent to be a resident of that state, and she invoked the jurisdiction of New York courts procedurally only, relying in her complaint upon the allegation of Petitioner's residence continuously for more than one year prior to the commencement of the action (R., fol. 33). Had she not, the subsequent finding of fraud on her part would have cleared the air of confusion, since by it, she remained a domiciliary of Indiana. It is clear that New York denied due process of law to Petitioner by applying N. Y. C. P. A. Sec. 1139 to the annulment action, and at the same time denied full faith and credit to the Indiana statute[20] upon which the action for annulment in Indiana is predicated, which, unlike the New York Statute, makes no mention of condonation.

It might be noted in passing that the application of New York law in determining the validity of this Indiana marriage must be evaluated as unsound in the light also of the "contacts theory" often applied by this Court.[21]

It is without doubt that the said application of New York law in determining the validity of the Indiana marriage is not merely a mistake in theory or just an academic error: The Indiana law would produce an opposite result. This Court has the duty of determining for itself what the law of Indiana is.[22] In Indiana, condonation is a different concept from that of New York, not only in the respect that it is there a matter of intent, but it is established that Indiana considers sexual intercourse to be condonation primarily of adultery.[23] Moreover, it would seem that New

[20] Burns Indiana Stat. Tit. 44 Sec. 44-106 (App. A, p. 25).

[21] See *Connecticut Ins. Co.* v. *Moore*, 333 U. S. 541 (1948).

[22] *Adam* v. *Saenger*, 303 U. S. 59 (1938); *Barber* v. *Barber*, 323 U. S. 77 (1944).

[23] *Mitchell* v. *Mitchell*, 126 Ind. App. 377, 133 N. E. 2d 79 (1956); *Fordice* v. *Fordice*, 126 Ind. App. 562, 132 N. E. 2d 618 (1956).

York's construction of its own condonation statute that an act of intercourse indulged in without—as the prior record shows—contraceptives of any kind, condones an intention *not* to have children, renders the said statute an insult to common sense, a contradiction in terms. In addition, it was undisputed in the earlier trial (R. fols. 908-910) that during the three days Respondent spent with Petitioner in New York after return from their European honeymoon, no sexual contact of any kind took place between the parties. The word "cohabited" appearing in Section 1139 of the Civil Practice Act necessarily presupposes sexual relations between the parties[24], and that this is the definition given to the word by the courts of New York is established.[25] It follows that what cohabitation did take place not only could not have been designed to cooperate with an intention to avoid children, but it never took place in New York. We finally see that in addition to the marriage and the fraud having taken place outside New York, and the Respondent's residence remaining outside New York, the very act supposedly constituting the condonation did not take place in New York, nor did the Respondent invoke the jurisdiction of New York as a domiciliary thereof (R., fol. 33). Not one vestige of connection with the transaction adjudicated traces to New York.

It is a viable position also that the judgment below, in completely ignoring the prior ruling in the Indiana action that Respondent's residence never left Indiana, has failed to give it the full faith and credit to which it is entitled, despite its interlocutory nature.[26]

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[24] 14 Corp. Jur. Sec., p. 1311.

[25] See *Bracksmayer* v. *Bracksmayer*, 22 N. Y. Supp. 2d 110, Sup. Ct. N. Y. Co. (1940).

[26] See dissent in *Barber* v. *Barber*, *supra*.

The action in Indiana, enjoined below, includes also a demand for divorce on the ground of cruelty. The Trial Court held (App. B, p. 34) that the prior dismissal in New York of Petitioner's action for separation on the ground of cruelty was *res judicata* of the issue of cruelty in the Indiana action for divorce, and called for its injunction. The undisputed evidence in the record below (R. fols. 649-51) shows that the standards of cruelty in Indiana differ from those of New York, that the law applied would be different, and that a different result might be reached. The conclusion of *res judicata* in this respect is, therefore, not sound. And, with respect to the implication in the opinion of the Trial Court below (App. B, p. 36) that the dismissal of Petitioner's counterclaim for separation on the ground of cruelty in New York should command full faith and credit in Indiana, resulting in the bar of his action for divorce there upon the same ground, the language of this Court in *Magnolia Petroleum* v. *Hunt*, *supra* at page 444, is relevant:

> "The fact that a suitor has been denied a remedy by one state because it does not afford a remedy for the particular wrong alleged, may not bar recovery in another state which does provide a remedy."

Conclusion.

For the foregoing reasons, Petitioner should be granted a Writ of Certiorari in this case.

Respectfully submitted,

THOMAS F. MEEHAN,
Counsel for Petitioner.

Dated June 27, 1958.

APPENDIX A.

Constitution and Statutes.

Constitution of the United States:

Article IV, Section 1:

"Full Faith and Credit shall be given in each state to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Article IV, Section 2 (in part):

"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Amendment XIV, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Code:

Title 28, Section 1738 (in part):

"The Acts of the legislature of any State, Territory, or Possession of the United States, * * *

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

Appendix A.

New York Civil Practice Act:

Section 1139 (in part):

"* * * But a marriage shall not be annulled * * * on the ground of fraud, if it appears that, at any time before the commencement thereof, the parties voluntarily cohabited as husband and wife, with a full knowledge of the facts constituting the fraud."

Constitution of Indiana:

"Art 1, Sec. 12: Courts Open—Due Course of Law—Administration of Justice—All Courts shall be open; and every man, for injury done to him in his person, property or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay."

Burns Indiana Statutes:

Title 44, Section 44-106 (in part):

"* * * when such marriage is procured through fraud of one (1) of the parties, the same may be declared void, on application * * * of the innocent party in the case of fraud, by any court having jurisdiction to decree divorces; * * * and, in such cases, the same proceedings shall be had as provided in applications for divorce."

Title 3, Section 3-1201 (in part):

"Divorces may be decreed upon the application of the injured party for the following causes, and no other:

* * *

Fourth. Cruel and inhuman treatment of either party by the other.

* * * "

APPENDIX B.

Opinions, Judgments, etc. in the instant Injunction Case.

Opinion of Appellate Division on Affirmance.

RABIN, J.:

This is an appeal by defendant from an order permanently enjoining him from proceeding with a pending divorce action in Indiana wherein he is the plaintiff.

The parties were married in Indiana in July, 1952. Prior to their marriage the wife resided in Indiana, the husband in New York. After their honeymoon they took up residence in New York. Very shortly thereafter they separated, the wife returning with all her baggage to her mother in Indiana by October 4 and the husband remaining in New York. Except for a brief return to New York for an unsuccessful attempt at reconciliation, the wife lived in Indiana until January, 1953 when she returned to New York. While so living in Indiana, the wife voted in that State in the November, 1952 elections.

The husband started the Indiana divorce action on December 20, 1952, which was later amended to include a count for annulment for fraud, as a result of process left for the wife at her parents' home. Two days later the wife commenced an action for separation in New York.

At the outset of the Indiana proceeding the wife there appeared specially to contest jurisdiction. The parties are agreed that a jurisdictional requisite of Indiana law is that the wife shall have been an Indiana resident for one year prior to the institution of the action. As indicated, the parties had made their marital residence in New York, and consequently Indiana apparently had no jurisdiction. The Indiana court, however, denied the wife's plea in abatement on the ground that the husband's claim of fraud, if sustained, would nullify the residence effect of the marriage. Accordingly, it was held that the issue of Indiana's jurisdiction would depend upon the result of the trial of the issue of fraud and the wife proceeded to enter a general appear-

ance in Indiana. The Indiana proceedings have not progressed beyond this point, there being no Indiana trial or judgment on the merits: The Indiana court on the application of the husband had originally granted an *ex parte* stay of the New York action, but later, upon ascertaining all of the facts, vacated the stay and refused to interfere with the New York proceedings.

In our courts the husband pleaded cruelty, abandonment and fraud as affirmative defenses and as counterclaims for separation and annulment. The trial court dismissed the complaint and awarded the husband a separation; this court ordered the dismissal of the counterclaims (283 App. Div. 1054); the Court of Appeals affirmed the dismissal of the counterclaims but directed entry of judgment for separation in favor of the wife (308 N. Y. 530). Significant for our purposes is the following language of Judge Fuld in writing for the majority of the Court of Appeals in affirming the finding that there was no fraud to support the counterclaim for annulment.

> "Turning to defendant's counterclaim for annulment, the Appellate Division was warranted in affirming Special Term's dismissal upon the ground that the evidence adduced was insufficient to establish that plaintiff possessed a premarital intention not to bear children; and, in any event, even if plaintiff had been guilty of such fraud, it would have been condoned by the subsequent cohabitation of the parties after defendant learned the facts constituting the alleged fraud. Civil Practice Act, §1139." (308 N. Y., at 532-3).

In view of the finding by the Court of Appeals that proof of fraud by the wife is absent, we affirm without canvassing the various issues raised by counsel or by the court below. For that finding, which is conclusive here and elsewhere (*Pray* v. *Hegeman*, 98 N. Y. 351; *Schuylkill Fuel Corp.* v. *B. & C. Nieberg Realty Corp.*, 250 N. Y. 304; *Statter* v.

Statler, 2 N. Y. 2d 668), establishes the absence of Indiana jurisdiction. Indiana jurisdiction is dependent upon the wife's residence in Indiana for one year prior to December, 1952; the marital residence of the parties prior to October 4, 1952 was New York; the husband's claim that the marriage was null for fraud has been squarely adjudicated against him; there is, therefore, now no room left for contention that Indiana has jurisdiction over the wife. In the circumstances this case comes squarely within the doctrine of *Garvin* v. *Garvin*, 302 N. Y. 96, and *Hammer* v. *Hammer*, 303 N. Y. 481.

Our conclusion is not affected by the wife's appearance in the Indiana proceeding. *Garvin* and *Hammer* intended to grant relief to the wife confronted with the prospect of a presumptively valid decree of a sister state, entitled to full faith and credit, where the residence of the suing spouse in the sister state is, in fact, but a sham. See *Rosenbaum* v. *Rosenbaum*, 309 N. Y. 371, 374-5. The wife's dilemma and the necessity for injunctive relief is not reduced because the wife here, fearful of risking default after service of Indiana process by the husband while she was living in Indiana, made that appearance in the Indiana proceeding essential to contest jurisdiction. The considerations of policy subserved by *Garvin* and *Hammer* would be demeaned if made dependent upon whether the wife here through her special appearance incurred rather than avoided the risk of an Indiana default judgment at a time before our courts made the finding of fact which established the absence of Indiana jurisdiction.

Judgment affirmed with costs and disbursements.

All concur.

Appendix B.

Opinion of Supreme Court, McGivern, J., Upon Completion of Trial.

This is an action by a wife for a permanent injunction restraining her husband from proceeding with an action which he had brought in Indiana for a divorce and an annulment.

The plaintiff wife originally was a native of Indiana and continued on as a resident thereof until she married the defendant, a New York resident, on July 19, 1952. After a honeymoon in Europe the parties took up residence in the Hotel Dorset, Manhattan. Shortly thereafter, following a quarrel, the plaintiff returned to her parents' home in Indiana, but then, after reflection, she traveled back to New York and offered to return to her husband. This offer was rejected by her husband, and so again she went back to her parents in Indiana, remaining there until March of 1953. At this time she again came to the State of New York, obtained employment and has remained here ever since.

In December of 1952 the parties instituted suits against each other: The wife sued in New York for separation and the husband in Indiana for divorce, and the actions were started almost simultaneously.

The action by the plaintiff in this court was for a separation on the grounds of abandonment and non-support and the other by the defendant in Indiana for a divorce on the grounds of cruelty. Subsequently the defendant husband added to his Indiana complaint a cause of action seeking an annulment on the grounds of fraud. The defendant husband was personally served here with process in the New York action. The plaintiff wife was served in the Indiana suit as a result of process left for her at her parents' home. She appeared specially in that action and challenged the jurisdiction of the Indiana court by a plea in abatement, alleging she was not a resident of Indiana. After a hearing, this plea was ruled against her, whereupon she appeared generally therein. Accordingly, there appears to be no

question but that both courts have jurisdiction of the person of both parties.

Shortly after the commencement of these actions, the plaintiff wife moved in this court for an order staying the defendant husband from proceeding with his Indiana suit, pending the determination of her New York action, and the defendant cross-moved for a stay of her action pending adjudication of his Indiana suit. Both the motion and cross-motion were denied by Mr. Justice Botein, and his disposition was affirmed on defendant's appeal (*Aghnides* v. *Aghnides*, 281 App. Div., 1018).

In his affidavit in support of his cross-motion the defendant avowed that the issues raised by his complaint in Indiana were "the same in substance" as the issues raised in this court by the plaintiff's complaint, and the same contentions were urged by him in opposition to the plaintiff's motion for temporary alimony. The charges advanced in these affidavits were thereafter pleaded in the New York action as affirmative defenses and also as counterclaims seeking a separation or an annulment on the grounds of cruelty, abandonment and fraud.

The trial court dismissed the plaintiff's complaint and granted the defendant a separation. The Appellate Division thereafter directed entry of a judgment dismissing each of the counterclaims (*Aghnides* v. *Aghnides*, 283 App. Div., 1054). Although the Court of Appeals affirmed the dismissal of the counterclaims, it directed entry of a judgment in plaintiff's favor for a separation (*Aghnides* v. *Aghnides*, 308 N. Y., 530). Such judgment has been entered on the remittitur of the Court of Appeals. Since the commencement of the instant action, the judgment on remittitur has been modified as to the amount of alimony, and as so modified affirmed (*Aghnides* v. *Aghnides*, 1 App. Div., 2d 879).

While the plaintiff was thus obtaining a complete victory in our courts, the Indiana action, bogged down in motions, pleas and demurrers, had not yet been reached for

trial when the plaintiff instituted the present suit. Shortly after it was commenced, Mr. Justice Gold, in an able opinion (*Aghnides* v. *Aghnides*, 150 N. Y. S., 2d, 371) granted a temporary injunction restraining the further prosecution of the Indiana suit; he also denied the defendant's cross-motion for judgment on the pleadings.

The plaintiff now urges that these rulings of my colleague constitute the law of the case and require a determination in her favor. Apart from the fact that the granting of an injunction, temporary or permanent, is always discretionary, the doctrine of "law of the case" is inapplicable (*Walker Memorial Baptist Church* v. *Saunders*, 285 N. Y., 462).

An issue of fact was raised by the pleadings herein as to the plaintiff's residence at the time of the commencement of the two matrimonial actions in December, 1952. Plaintiff claims she was then a resident of New York; defendant says she was then a resident of Indiana. However, in strict legality, when the parties married in July, 1952, the plaintiff's domicile became that of the defendant (Matter of Daggett, 255 N. Y., 243), to wit, New York. And when, as the Court of Appeals held (*Aghnides* v. *Aghnides*, *supra*, at p. 532), the defendant husband abandoned her, she had a right to set up a new domicile for herself and bring the matrimonial domicile with her (*Vanderbilt* v. *Vanderbilt*, 1 N. Y., 2d, 342, 351, cert. gtd. 253 U. S.,——, L. Ed., 2d, 45). Her instant cause must be viewed in that light unless the husband can meet the contrary burden of proof (Matter of Newcomb, 192 N. Y., 238, 250). And he has failed to sustain this burden, or to show that the plaintiff's presence in Indiana was other than a temporary visit to her parents, occasioned by the sudden break-up of her marriage.

The defendant places much weight on the fact that Mrs. Aghnides voted in Indiana in November, 1952. She, however, explains that she voted under the supposed authority of a previous permanent registration record. Giving con-

sideration to the plaintiff's explanation, the normal desire to vote in a presidential election, and her ineligibility to vote in New York because of our one-year residence requirement, Election Law, section 150, her action in casting a vote cannot be regarded as substantial evidence of an intention to abandon her New York domicile.

The defendant husband also claims that the overruling of his wife's plea in abatement by the Indiana court constitutes an adjudication that she was a resident of that state and that such action is entitled to full faith and credit in this jurisdiction. But this view overlooks the accepted principle that a judicial determination "has no constitutional claim to a more conclusive or final effect in the State of the forum than it has in the State where rendered" (*People ex rel. Halvey* v. *Halvey*, 330 U. S., 610, 614; *Langerman* v. *Langerman*, 303 N. Y., 465, 473-4). And pursuant to Indiana law, it would appear that in order for the principles of *res judicata* to be applicable, there must be a final judgment (see *Jones* v. *Vert*, 121 Ind., 140, 142). In that state it has been specifically held that a ruling sustaining a demurrer to a plea in abatement is not a decision on the merits or a final judgment entitled to recognition as *res judicata* (*Thompson* v. *Mitchell*, 54 Ind. App., 258, 261; *Rife* v. *Diamond Flint Glass Co.*, 42 Ind. App., 346). And of significance is the point that the defendant husband urged the Indiana court to defer determination of residence until the trial on the merits; for aught that appears the court acceded to that suggestion. In any event under New York law, even a clear determination of fact made on an interlocutory motion is not *res judicata* (*Bannon* v. *Bannon*, 270 N. Y. 484). In the absence of evidence to the contrary, and there is none here, it must be assumed that the law of Indiana is the same as that of New York (*Gaines* v. *Jacobsen*, 308 N. Y., 218, 222).

For the foregoing reasons, this court holds that the ruling of the Indiana court is not definitive and is not to be regarded as *res judicata* of the plaintiff's residence, and

that the defendant has not sustained his burden of proving that the plaintiff changed her domicile. The court further finds that the plaintiff has been a resident of, and domiciled in, the State of New York continuously since her marriage to defendant on July 19, 1952.

Concededly there is no question of the power of New York courts to enjoin its residents from litigating in the tribunals of other jurisdictions; the most common current instances wherein this power is invoked appear in cases where the foreign courts do not have jurisdiction (*Hammer* v. *Hammer*, 303 N. Y., 481; *Garvin* v. *Garvin*, 302 N. Y., 96). In the case at bar the Indiana court does seem to have personal jurisdiction over both parties, since the wife, after her plea in abatement was overruled, appeared generally therein. And so those decisions *(supra)* have no relevance to the situation that confronts us.

However, want of jurisdiction in the foreign court is not the only ground for enjoining proceedings therein. Two of the other grounds for granting such relief are applicable to the instant situation: (1) where the subject matter of the foreign suit has been adjudicated (*Heitzmann* v. *Casanave*, 128 N. Y. S., 2d, 415, 416; *Wehrhane* v. *Peyton*, 134 Conn., 486, 494-5; *O'Haire* v. *Burns*, 45 Colo., 432; *Oates* v. *Morningside College*, 217 Iowa, 1059, 1066-7), and (2) where a resident is suing in a foreign jurisdiction to avoid the laws of this state (*Webster* v. *Columbia National Life Ins. Co.*, 131 App. Div., 837; *Dinsmore* v. *Neresheimer*, 32 Hun, 204; *Oates* v. *Morningside College*, *supra*). In each of these cases the foreign court had jurisdiction of the parties and yet an injunction was held proper. In *Latham & Co.* v. *Mayflower Industries* (278 App. Div., 90, 94) there is dictum to the effect that "A foreign suit will also be enjoined where • • • its purpose is to evade the law of the domicile of the parties • • •."

In the matter at hand, the final judgment in the New York matrimonial action between the parties, entered on the remittitur of the Court of Appeals, is clearly *res judi-*

cata of the Indiana action between the parties. The New York judgment, granting the plaintiff a separation and dismissing the defendant's counterclaims, establishes that the plaintiff's conduct during the marriage was not improper; that she was not guilty of such cruelty or other misconduct as would deprive her of her right to support; that defendant abandoned plaintiff without just cause, and that he was not induced to enter into the marriage by actionable fraud. And as pointed out above, the defendant has admitted that the issues raised in the two actions "are the same, in substance."

In the leading case of *Schuylkill Fuel Corporation* v. *Nieberg Realty Corporation* (250 N. Y., 304, 306, 7), Chief Judge Cardozo said: "A judgment in one action is conclusive in a later one not only as to any matters actually litigated therein, but also as to any that might have been so litigated, when the two causes of action have such a measure of identity that a different judgment in the second would destroy or impair rights or interests established by the first (*Cromwell* v. *County of Sac*, 94 U. S. 351; *Reich* v. *Cochran*, *supra*, 151 N. Y., 122). It is not conclusive, however, to the same extent when the two causes of action are different, not in form only (*Baltimore SS. Co.* v. *Phillips*, *supra*, p. 321, 274 U. S., 316), but in the rights and interests affected. The estoppel is limited in such circumstances to the point actually determined (*Cromwell* v. *County of Sac*, *supra*)."

Manifestly, a judgment for the husband in the Indiana suit would destroy or impair rights or interests established by the wife's New York judgment of separation; therefore the latter is conclusive as to anything that might have been litigated in the New York action. The defendant husband had an opportunity to assert all his defenses and counterclaims in the New York action and he did assert them. He may not relitigate them in Indiana (*Brownell* v. *Chase National Bank*, 352 U. S. ——, 1 L. Ed., 2d, 99, 101). It makes no difference that the New York action was for a separation and that a divorce is sought in Indiana, since

both actions are based on the same facts (*Harding* v. *Harding*, 198 U. S., 315; see also *Kalisch* v. *Kalisch*, 9 Misc., 529; *Vickers* v. *Vickers*, 45 Nev., 274).

In *Vickers* v. *Vickers* (*supra*) it appeared that the wife had obtained a separation judgment in West Virginia on the grounds of abandonment; in that action the husband had pleaded cruelty as a defense. It was held that he could not thereafter obtain a divorce in Nevada on the ground of cruelty. The court said at pages 281, 287 and 285 of 45 Nev.: "It matters not the character of the proceeding in which issues are adjudicated, but whether they have in fact been adjudicated between the parties or their privies. * * * If Dr. Vickers had succeeded in establishing the issue growing out of his charge of cruelty as a ground of defense, Mrs. Vickers could not have recovered, as there then could have been no abandonment. * * * Hence it appears beyond question that the identical issue—cruelty—was involved in the West Virginia proceeding as is involved in this one, and growing out of the same state of facts. Why should this issue be retried in the Nevada courts? If it can be retried here, might it not be retried in as many of the forty-eight states of the Union as permit a divorce on the ground of cruelty?"

Furthermore, the fact that the wife has pleaded the defense of *res judicata* in the Indiana suit does not deprive her of her right to equitable relief here (*O'Haire* v. *Burns*, *supra*). In *Wehrhane* v. *Peyton* (*supra*) it was held that a Connecticut judgment was entitled to full faith and credit in a subsequent New York action, but that the Connecticut court could issue an injunction against prosecution of the New York action to prevent harassment of, and litigation expense to, the parties who had been successful in Connecticut.

The only basis on which the defendant herein could hope to succeed in Indiana is on the theory that the Indiana law is different from ours and that the conduct of his wife, held by our courts not to give him just cause for leaving

her, would be regarded by the Indiana courts as grounds for a divorce. Apart from the fact that such a holding would appear to be a denial of full faith and credit (*Magnolia Petroleum Company* v. *Hunt*, 320 U. S., 430, 445-6), the defendant is clearly trying to evade the laws of his home state, and that in itself is a cogent reason for granting an injunction against the foreign action.

As to the husband's claim that the plaintiff was found guilty of fraud in the New York action, that he was denied an annulment solely because of condonation and the specific statutory provisions of N. Y. C. P. A. section 1139 with reference thereto, and that there are no comparable provisions of Indiana law on the subject of condonation, there are two answers to this contention. In the first place, Judge Fuld said in the Aglinides decision at pages 532-3 of 308 N. Y.: "'Turning to defendant's counterclaim for annulment, the Appellate Division was warranted in affirming Special Term's dismissal upon the ground that the evidence adduced was insufficient to establish that plaintiff possessed a premarital intention not to bear children * * *." And so we see it cannot be said that the plaintiff was ultimately adjudged guilty of fraud or that an annulment was denied solely because of condonation. Secondly, for the reasons stated in the preceding paragraph, a New York resident will not be allowed to evade the provisions of section 1139 by suing in another jurisdiction.

The fact that the plaintiff appeared generally in the Indiana action does not preclude the granting of an injunction. Such an appearance merely established the personal jurisdiction of the Indiana court over her. The basis for the injunction herein is not lack of jurisdiction in the foreign court, but *res judicata* and the defendant's clear attempt to evade New York law while still remaining a resident of this state. Actually, if it has any effect on the granting of an injunction, the circumstances of her general appearance in Indiana enhance the need therefor. The rationale of *Rosenbaum* v. *Rosenbaum* (309 N. Y., 371, 375, 377)

is that an injunction against foreign proceedings will be granted if the foreign judgment would be more than "a complete nullity," and will be denied where "plaintiff need have no fear for her property rights and marital status under New York law." In the instant case, the plaintiff has good reason to recoil from the effect of an Indiana judgment on her rights and status, for if Indiana were to deny the validity of the New York separation judgment, she might be confronted with an Indiana judgment entitled to full faith and credit here (*Lynn* v. *Lynn*, 302 N. Y., 193, 201). In *Estin* v. *Estin* (334 U. S., 541, 546), it was declared that each state has an interest in the marital status of its domiciliaries and "should have the power to guard its interests in them by changing or altering their marital status and by protecting them in that changed status throughout the farthest reaches of the nation." The State of New York has an interest in the marital status of the parties herein, one of whom has been a resident for a long time prior to the marriage and the other having become a resident upon such marriage. New York courts have, by the separation judgment, adjudicated their marital status, and New York courts when called upon should protect plaintiff, a resident of New York, in that status, as here adjudicated, throughout the nation. She should not be put to the expense, harassment and inconvenience of relitigating the same issues in Indiana. "One fight on an issue is enough" (*Treigles* v. *Sunshine Mining Co.*, 308 U. S., 68; 78).

Accordingly the defendant will be permanently enjoined from further proceedings in the pending Indiana action. As to the prayer of the plaintiff that the defendant be enjoined from any action anywhere outside New York in respect of the marital status of the parties, this is denied. She is not entitled to so broad an injunction. No such other action is presently on the horizon, and if such an action does evolve in the future, it may be based on grounds other than those adjudicated in the prior New York suit.

Settle findings, conclusion and judgment accordingly.

Appendix B.

Opinion of Supreme Court on Granting Injunction *Pendente Lite*

GOLD, Justice.

Plaintiff moves for an injunction *pendente lite*, restraining defendant, her husband, from further proceedings in an action for divorce or annulment brought by him in the State of Indiana. The basis of the application is that the issues presented in the Indiana action have already been adjudicated in favor of the plaintiff in a separation action instituted by her in this State. Injunctive relief against actions which may be commenced elsewhere is also sought.

The parties were married in Indiana on July 19, 1952, at the home of plaintiff's parents. After their honeymoon they took residence in New York City, where defendant had been residing. Difficulties arose, and efforts at reconciliation failed. Defendant started an action in Indiana for divorce on the ground of cruelty. About the same time plaintiff commenced suit here for a separation. By amendments to his answer, defendant pleaded counterclaims for separation and annulment, predicated upon plaintiff's alleged cruelty, abandonment and fraud. The case was tried, and ultimately reached the Court of Appeals, 308 N. Y. 530, 127 N. E. 2d 323. That court held that plaintiff was entitled to a judgment of separation and that the counterclaims for separation and annulment should be dismissed. Final judgment, awarding plaintiff a separation and dismissing the counterclaims, has been entered upon the remittitur of the Court of Appeals.

[1] Comparison of the allegations of the counterclaims in the New York action with the charges made by defendant in the Indiana complaint establishes clearly that the New York judgment is a bar, under the doctrine of *res judicata*, to the successful maintenance of the Indiana action. The issues presented in the latter action have already been conclusively determined in the courts of this State.

[2] Defendant's counsel asserts, however, that equity will not enjoin the prosecution of another action between the parties on the ground of *res judicata*, because the defense of prior adjudication may be pleaded in the action sought to be enjoined. The cases cited by defendant do not, however, support this contention. Many of them do not involve the question here presented. For example, in *Rosenbaum* v. *Rosenbaum*, 309 N. Y. 371, 130 N. E. 2d 902, injunctive relief was denied, *not because of a prior adjudication here (there had been none)*, but solely because a Mexican decree, if obtained, would be absolutely void and of no effect. The court expressly differentiated the case from one involving an application to enjoin a suit in a sister state of the United States, in view of the fact that a decree obtained in a sister state would be entitled to full faith and credit under the United States Constitution. Nor was any question of *res judicata* involved in such cases as *Paramount Pictures, Inc.*, v. *Blumenthal*, 256 App. Div. 756, 11 N. Y. S. 2d 768, and *E. B. Latham & Co.* v. *Mayflower Industries, Inc.*, 278 App. Div. 99, 103 N. Y. S. 2d 279. This line of cases stands merely for the proposition that a resident of this State *(who has not obtained an adjudication of his rights against the defendant)* may not enjoin the defendant, though a resident of the same state, from maintaining a suit against the plaintiff in a foreign jurisdiction in the absence of special circumstances, such as bad faith or vexatiousness, or intent to defraud or to evade the laws of the domicile. Had the plaintiff in those cases previously obtained a judgment disposing of the same issues as those raised in the foreign forum, a different situation would have been presented.

In other cases relied upon by defendant, the action sought to be enjoined was pending in the courts of the very state in which the prior adjudication occurred. See, for example, *Colson* v. *Pelgram*, 259 N. Y. 370, 182 N. E. 19. In such a situation, it was simpler for the party claiming *res judicata* to plead that defense in the action sought to be enjoined than to commence an injunction action and apply

for a restraining order. The hardship involved in defending an action in a distant state was not present in such cases.

Cases like *Hummer* v. *Hummer*, 303 N. Y. 481, 104 N. E. 2d 864; *Garvin* v. *Garvin*, 302 N. Y. 96, 96 N. E. 2d 721, and *Pereira* v. *Pereira*, 272 App. Div. 281, 70 N. Y. S. 2d 763, relied upon by *plaintiff*, are also not in point here. In those cases there had been no prior adjudication. Injunctive relief was granted in those cases to a spouse who had not appeared in the foreign jurisdiction, on the ground that the plaintiff in the foreign suit did not possess a *bona-fide* domicile in the foreign state. Had the spouse who sought the injunction appeared in the foreign action, the cases would have been differently decided. The plaintiff in the case at bar did appear in the Indiana action. She claimed she was not a resident of Indiana, but her plea in abatement was overruled.

[3] To compel this plaintiff, after exhaustive litigation of the rights of the parties up to the highest court of this State, to now undergo the hardship of defending the Indiana action and running the risk that a plea of *res judicata* might be overruled, in which event the rights of the parties would have to be entirely relitigated, is most unjust and inequitable. Plaintiff would be subjected to great expense in the employment of Indiana counsel and on transportation and living expenses on trips she would be obliged to make to Indiana. She is regularly employed here and would have to take time off to make the trips which would be required. Indeed, the continued maintenance of the Indiana action can be motivated only by an intent to vex and harass this plaintiff for no good purpose, thus bringing it within the rule of *Paramount Pictures, Inc.* v. *Blumenthal*, *supra*, and *E. B. Latham & Co.* v. *Mayflower Industries, Inc.*, *supra*, which (even in the absence of a prior determination) permits injunctive relief if the purpose of the foreign suit is to vex and harass, or to evade or circumvent our laws, or if the foreign suit is prosecuted in bad faith.

This court adopts the view expressed in 28 Am. Jur. (Injunctions, p. 215), p. 399:

> "It would seem that the availability of such a defense after prior adjudication in the foreign jurisdiction is not a sufficient reason for denying the injunction, as it would be inequitable and unjust and cause the party great hardship and irreparable injury to compel him to relitigate in the foreign state the same matters already litigated and settled in the forum."

Cases to this effect in this State are: *Dinsmore* v. *Neresheimer*, 1st Dept., 32 Hun 204, and *Heitzmann* v. *Casanave*, Sup., 128 N. Y. S. 2d 445 (Walter, J.); and in other jurisdictions: *Sandage* v. *Studebaker Bros. Mfg. Co.*, 142 Ind. 148, 41 N. E. 380, 34 L. R. A. 363; *O'Haire* v. *Burns*, 45 Colo. 432, 101 P. 755; and *Wehrhane* v. *Peyton*, 134 Conn. 486, 58 A. 2d 698, 6 A. L. R. 2d 887.

[4] For the reasons indicated, the motion is granted in so far as it seeks to restrain the prosecution of the Indiana action. The motion is denied in so far as it seeks to enjoin actions which may be commenced elsewhere, in a state other than New York, "in respect of the marital status of the parties." This request is entirely too broad, and is premature. No claim is made that such other actions are contemplated, nor is there any way of knowing whether the charges to be made in such actions, if any are commenced, are barred under the doctrine of *res judicata*.

Appendix B.

Judgment of Affirmance

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK.

MARGOT E. AGHNIDES,
Plaintiff,
against
ELIE P. AGHNIDES,
Defendant.

Judgment
3209/56

The Judgment in this action in favor of the plaintiff enjoining the defendant, Elie P. Aghnides, from prosecuting an action for divorce and annulment instituted by him in the Superior Court of Marion County, State of Indiana, having been duly entered in the Office of the Clerk of this Court on the 4th day of February, 1957, and the defendant, Elie P. Aghnides, having appealed to the Appellate Division of the Supreme Court, First Department, and the appeal having been duly submitted by Corbin, Bennett & Delehanty, Esqs. (Harold H. Corbin of counsel) for the appellant, and by Proskauer Rose Goetz & Mendelsohn, Esqs. (Harold H. Levin of counsel) for the respondent; and due deliberation having been had and the aforesaid Judgment having been unanimously affirmed with costs and disbursements by an order of the Appellate Division entered October 29, 1957, and said costs and disbursements of the plaintiff having been duly taxed in the sum of $98.87.

Now, on motion of Proskauer Rose Goetz & Mendelsohn, attorneys for the plaintiff, it is

ADJUDGED that the aforesaid Judgment of this Court entered the 4th day of February, 1957, be and the same is hereby affirmed in all things, and it is

FURTHER ADJUDGED that the plaintiff Margot E. Aghnides, do recover of the defendant, Elie P. Aghnides, the sum of $98.87 costs and disbursements.

Judgment entered October 31, 1957.

HYMAN W. GAMSO,
Acting Clerk.

Order of Affirmance on Appeal from Judgment

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 29th day of October, 1957.

Present:

Hon. DAVID W. PECK,
Presiding Justice,
Hon. CHARLES D. BREITEL,
Hon. BERNARD BOTEIN,
Hon. BENJAMIN J. RABIN,
Hon. MARTIN M. FRANK,
Justices.

MARGOT E. AGHNIDES,
Plaintiff-Respondent,

vs.

ELIE P. AGHNIDES,
Defendant-Appellant.

11298

An appeal having been taken to this Court by the defendant appellant from the judgment of the Supreme Court, New York County, entered on the 4th day of Febru-

ary, 1957, enjoining defendant from prosecuting an action for divorce and annulment instituted by him in Superior Court of Marion County, State of Indiana, and said appeal having been argued by Mr. Harold H. Corbin of counsel for the appellant, and by Mr. Harold H. Levin of counsel for the respondent; and due deliberation having been had thereon, and upon the opinion of Mr. Justice Rabin filed herein,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed; and that the respondent recover of the appellant the costs and disbursements of this appeal.

Enter:

VINCENT A. MASSI,
Clerk

Judgment of Trial Court

At a Trial Term, Part X of the Supreme Court of the State of New York, held in and for the County of New York at the Courthouse, 60 Centre Street, Borough of Manhattan, City, County and State of New York, on the 31st day of January, 1957.

Present:

HON. OWEN MCGIVERN,
Justice.

[TITLE]

The issues in the above entitled action having duly and regularly come on for trial before Mr. Justice Owen McGivern at Trial Term Part X of this Court on the 29th day of November, 1956; and the respective parties having

appeared by their attorneys; and the Court having heard the allegations and proofs of the parties; and after due deliberation having duly made its findings of fact and conclusions of law on January 23, 1957, and the same having been filed on January 24, 1957,

Now, on motion of Proskauer Rose Goetz & Mendelsohn, Esqs., attorneys for the plaintiff it is hereby

ORDERED, ADJUDGED and DECREED that the defendant Elie P. Aghnides, his attorneys, agents and any other persons acting for or in his behalf, be and they and each of them hereby are permanently enjoined and restrained from prosecuting, going forward with, or taking any further step or procuring any act to be done in furtherance of the action for divorce and annulment heretofore instituted by said defendant Elie P. Aghnides against the plaintiff Margot E. Aghnides in the Superior Court of Marion County, State of Indiana, and thereafter transferred to the Superior Court of other counties in said State of Indiana.

ENTER:

O. McG.

J.S.C.

Appendix B.

Order Denying Leave to Appeal to Court of Appeals

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 28th day of January, 1958.

Present:

Hon. BERNARD BOTEIN,
Justice Presiding.
Hon. CHARLES D. BREITEL,
Hon. BENJAMIN J. RABIN,
Hon. MARTIN M. FRANK,
Justices.

MARGOT E. AGHNIDES,
Plaintiff-Respondent,

vs.

ELIE P. AGHNIDES,
Defendant-Appellant.

The above named defendant-appellant having moved for leave to appeal to the Court of Appeals from order of this court entered October 29, 1957, and from the judgment entered thereon on October 31, 1957,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavit of Edward J. Bennett in support of said motion, and the affidavit of Harold H. Levin in opposition thereto, and after hearing Mr. Edward J. Bennett for the motion, and Mr. Harold H. Levin opposed,

It is hereby unanimously ordered that the said motion be and the same is hereby denied with $10 costs.

Enter:

VINCENT A. MASSI,
Clerk.

Order Denying Leave to Appeal to Court of Appeals

IN COURT OF APPEALS

STATE OF NEW YORK

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the third day of April A. D. 1958.

Present,

HON. ALBERT CONWAY,
Chief Judge, presiding.

Mo. No. 167

[redacted] AGHNIDES,
Respondent,

vs.

ELIE P. AGHNIDES,
Appellant.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had;

ORDERED, that the said motion be and the same hereby is denied with ten dollars costs and necessary printing disbursements.

A copy

(SEAL OF COURT OF APPEALS)

S. GEARON KIMBALL
Deputy Clerk

Appendix B.

Excerpts from Pleadings

Complaint (R. fol. 26):

"18. Defendant, nevertheless claims (a) that the final judgment of this Court is not binding and conclusive; (b) that he has the right to pursue his action for divorce and annulment in Indiana to a judgment, and (c) that if he can prevail in Indiana, he will not be required to comply with the final judgment of this court."

Answer (R. fol. 139):

"9. Denies each and every allegation contained in paragraph numbered '18' of the complaint, except admits that defendant claims the right to pursue his action for divorce and annulment in Indiana to a judgment."

Amendment to Answer (R. fol. 456):

"19. Granting of the relief prayed for in the complaint herein would be contrary to and in violation of Article IV of the Constitution of the United States which requires that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, and, further, in violation of Article XIV of the Amendment to such Constitution which guarantees due process of law and the equal protection of the laws."

Excerpts from Findings of Fact and Conclusions of Law by Supreme Court

Findings of Fact:

"10. Under Indiana law the ruling against plaintiff on her plea in abatement was neither a decision

on the merits nor a final judgment and was not *res judicata* of any issue between the parties." (R. fols. 493-4)

"19. After this Court entered a judgment of separation in her favor, plaintiff amended her answer in the Indiana action to allege that said New York judgment was *res judicata* of the issues in said Indiana action and was entitled to full faith and credit therein." (R. fol. 499)

Conclusions of Law:

"Second: The final judgment of separation granted by this Court to plaintiff is *res judicata* of the issues tendered by defendant's Indiana action for annulment and divorce based on fraud and cruelty and is entitled to full faith and credit in Indiana." (R. fol. 501)

"Fourth: The fact that plaintiff has asserted and may defend by establishing the defenses of *res judicata* and full faith and credit in defendant's Indiana action based upon the final judgment entered by this Court does not afford her an adequate remedy and she has no adequate remedy at law." (R. fols. 502-3)

"Seventh: The overruling of plaintiff's plea in abatement in Indiana would not, under Indiana law, be regarded as *res judicata* of plaintiff's residence and that determination thus is not entitled to full faith and credit in the courts of this state." (R. fol. 504)

APPENDIX C.

Opinions in the Prior, Related Separation Action.

Opinion of Court of Appeals

FULD, *J.*:

In this action brought by plaintiff wife for a separation, defendant husband interposed a counterclaim for separation or, in the alternative for an annulment on the ground that plaintiff, when she married him, never intended to have any children. The court at Special Term granted the husband's counterclaim for separation, and dismissed both the wife's complaint for separation and the husband's counterclaim for an annulment. The Appellate Division affirmed the dismissal of the latter two claims, but—reversing certain findings of fact and making new ones in their place—modified the judgment by dismissing the husband's counterclaim for separation as well. The parties were thereby left in the same position as they were before the litigation, and each has appealed from so much of the Appellate Division judgment as denied the relief originally sought.

In our view, the weight of the credible evidence supports the findings of the Appellate Division that the act of plaintiff in leaving home for a visit to her mother did not amount to an abandonment of her husband, that soon after her departure she unequivocally offered to return to him and that he rejected those proffers. Accordingly, not only was the Appellate Division justified in reversing the judgment of separation obtained by defendant, but it was actually required to go further and grant plaintiff a judgment of separation. "If the wife's absence is a temporary one which has not ripened into an abandonment at the time she offers to return, it is the husband's duty to take her back" (*Bohmert* v. *Bohmert*, 241 N. Y. 446, 451), and an unjustified rejection by defendant husband of plaintiff wife's unconditional offers spells out an abandonment on his part entitling her to a judgment of separation. (See, e.g., *Campbell* v. *Campbell*, 306 N. Y. 581; *Solomon* v. *Solo-*

niow, 280 N. Y. 337, 340-341; *Mirizio* v. *Mirizio*, 248 N. Y. 175, 179-180; *Silberstein* v. *Silberstein*, 218 N. Y. 525, 529.).

Turning to defendant's counterclaim for annulment, the Appellate Division was warranted in affirming Special Term's dismissal upon the ground that the evidence adduced was insufficient to establish that plaintiff possessed a pre-marital intention not to bear children; and, in any event, even if plaintiff had been guilty of such fraud, it would have been condoned by the subsequent cohabitation of the parties after defendant learned the facts constituting the alleged fraud (Civil Practice Act, §1139).

The judgment of the Appellate Division should be modified and the case remitted to Special Term for further proceedings in accordance with the opinion herein.

* * * * * * *

Judgment of the Appellate Division modified and the case remitted to Special Term for further proceedings in accordance with the opinion herein. Opinion by Eald, J. All concur except Dye and Van Voorhis, JJ., who dissent and vote to affirm the judgment of the Appellate Division.

Per Curiam Opinion of Appellate Division

By: Peck, *P. J.*; Dore, Callahan, Breitel and Botein, *JJ.*

8139. Aghnides, plf-ap-res, v. Aghnides, def-res-ap—Within three months after her marriage to defendant, a man nearly twenty years older than herself, plaintiff had been hospitalized for a week, had taken a honeymoon-trip to Europe, returned to this country, left defendant for her parents' home in Indianapolis, and less than two weeks after that departure made repeated and unequivocal offers and attempts to return to defendant. Defendant disputes the bona fides of plaintiff's offer to return, and the learned trial justice has granted his counterclaim for separation on the ground that plaintiff's offer contained material reservations. However, the only evidence to sustain this ground

must be found in plaintiff's conduct during the first two and a half months of this turbulent marriage or in a short, indefinite conversation between the parties on October 23, 1952. Plaintiff's conduct during the early, trying stages of her marriage was not of such a character as to warrant a finding that it had frozen into a permanent attitude which must brand her subsequent offers to return as made in bad faith. The conversation testified to by defendant—and flatly denied by plaintiff—is ambiguous and doe not necessarily bear the conclusory interpretation put upon it by defendant. We therefore hold that the evidence in the case falls short of what is required to sustain defendant's counterclaim for separation. Judgment unanimously modified, without costs, so as to deny and dis niss defendant's counterclaim for separation and otherwise affirmed. Settle order on notice.

Opinion of Trial Court

SUPREME COURT

By Mr. Justice Stkuer

Aghnides v. *Aghnides*—The parties to this action were married in 1952 at the bride's home in Indianapolis. The defendant husband, then forty-eight years of age, is a member of a distinguished Greek family. He is an engineer by profession and the holder of several patents one of which was bringing him very large royalties. The plaintiff is the daughter of a successful business man, approximately twenty years junior to her husband, well educated and experienced in life using that expression in no perjorative sense.

After their wedding they vacationed briefly at Spring Lake, New Jersey, where the plaintiff suffered an attack of German measles. Upon her discharge from medical care they went to Europe for an extensive trip, returning to

New York at the end of September. The trip was characterized by several incidents of no great significance which can be attributed to the usual difficulties of adjustment augmented by the divergence in age and social background of the parties.

On their return an incident with more serious consequences developed. It is not necessary to describe this incident other than to say that it concluded by plaintiff using strong and grossly insulting language to defendant and, although for a short period they continued to live in the same apartment, the defendant showed his resentment by continued coolness to the plaintiff. The latter realized that her conduct had not been proper and sought forgiveness orally and in notes. Progress was not rapid and plaintiff requested her mother to come to New York, which she did. The visit produced mixed results. While plaintiff's mother had no difficulty with defendant, she yielded to a request from her daughter that the latter accompany her to Indianapolis for a fortnight's visit without defendant. This visit was without defendant's consent, though a man of his perspicacity would be very likely to have anticipated it. He took no active steps to prevent it. In any event, near the termination of the two weeks, plaintiff wrote defendant asking whether he would call for her or whether he wished her to come on alone. He replied that her departure had been contrary to his wishes and that he was at a loss to understand her.

Plaintiff thereupon returned to New York with her father. They met defendant. Versions of the meeting vary somewhat, but it is clear that defendant indicated that he strongly doubted the good faith of plaintiff. The significant point of the meeting and the note on which it terminated was defendant's inquiry as to whether plaintiff's offer to return meant that she was willing to bear children. The question was not answered.

That plaintiff abandoned defendant there can be no doubt. Nor is it subject to question that she offered to

return. Her rights depend upon the bona fides of her offer. It has been pointed out that the offer to return was made after the receipt of legal advice. This alone would not affect its validity. She was in an awkward position, even though of her own making, and she is not subject to criticism nor is her offer merely because it bears signs of the ingeniousness of legal advice. Her earlier offers prior to the actual abandonment do not suffer this disability and the later ones on which she now relies show a continuance of attitude. It is true that offers attended as hers were have been discounted largely on that ground (*Bohmert* v. *Bohmert*, 241 N. Y., 446) but the rule is not absolute. A husband is not required to test the good faith of the wife's offer by resuming life with her in every case. He is excused where the circumstances indicate a lack of good faith, and the fact that the offer was the result of legal advice is a factor to be considered (*Solomon* v. *Solomon*, 290 N. Y., 337). The proposed resumption of relationship must, however, be without reservation. The material question between these parties was whether the plaintiff wife was willing to bear children. As this question is the matter of defendant's counterclaim for annulment can best be discussed in connection with it.

No point is raised in connection with whether plaintiff represented that she would be willing to bear children. She concedes that whether or not this was a subject of discussion it was implied in her conduct. It is a tenet of her religion and she admits an obligation in that respect. The factual issue is as to her conduct in respect to that obligation.

Plaintiff did demonstrate a marked eagerness to avoid pregnancy throughout her marriage. This anxiety reached its apex while the parties were in Europe and perhaps the focal point of this decisive element in their brief life together came when they were in Belgium on their honeymoon. At that time, in August, 1952, they visited a doctor. Both of the parties as well as the doctor testified to the

happenings on that visit. Despite conflict the fact is quite clear. The occasion for consulting the physician was plaintiff's fear that she had become pregnant. The effect of this apprehension was marked. On being assured that she was not pregnant she insisted on some treatment or drug that would insure her having her menstrual period. The doctor attempted to change her attitude but failed and a prescription for a drug having an inducing effect to that end (but only efficacious in the absence of pregnancy) was given her. There is no doubt of what state of mind this indicates. Plaintiff seeks to limit the effect of this incident by taking the position that consulting the doctor was not her idea alone but was the mutual thought of herself and her husband. The fact is that he acquiesced because in the circumstances there was little else he could do. Secondly, she ascribes her fears to the effect her attack of measles would have on any child conceived by her at that time. It is a fact that this disease is recognized medically to be capable of injuring offspring conceived during its activity and plaintiff may have been aware of that fact. But that knowledge, assuming its existence, does not appear to have been her motivating cause. She did not tell the doctor about it and never discussed the possibility with anyone at that time. As she was opposed by both her husband and the doctor it is improbable to believe that she would have omitted to raise this point at the interview had it been present in her mind at the time. As regards this interview she explains the doctor's differing version by the divergence of language. The doctor was more fluent in French than in English and her situation was quite the reverse, but it was apparent that they each had enough of the other's tongue to be mutually understandable.

The conclusion is therefore reached that plaintiff did not intend to bear a child by defendant and her attitude had not changed at the time she offered to return. This disposes of her claim for separation. And while it establishes fraud on defendant's claim for annulment it does not dispose of that claim.

The interview with the doctor was late in August. Plaintiff abandoned the defendant in early October. In between these dates the parties cohabited. By statute cohabitation with knowledge of the fraud is a bar to annulment (C. P. A., sec. 1139). Defendant claims that he did not fully realize plaintiff's intentions until she abandoned him. Such tardy recognition of the fact challenges belief (*McGill v. McGill*, 179 App. Div., 343, aff'd 226 N. Y., 673). Faced with plaintiff's evasive tactics up till August he was then met with a flat declaration plus an outright attempt to prevent conception. At that time her intent was as evident as it could become. It does not lie in the mouth of the defendant to challenge the probative value of facts on which he relies. If then they did not convince him he cannot expect others to be convinced now. The abandonment added nothing in a probative way on this issue. The defendant has waived the fraud.

The complaint and the counterclaim are both dismissed. Settle judgment accordingly.